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In The

Supreme Court of the United States

October Term, 1991

JOYCE INABA, SHARON HANNAH, GENEVIEVE KINNEY, LARRY TEST, PATRICK W. NAUGHTON, JANICE KIDO, SONJA NOTZ, WINIFRED TATSUTA, JUDITH MILLER, ELEANOR STERLING and JEANETTE JUSTICE, as Individuals,

Petitioners,

vs.

ROSEMARY SOONG and JAMES SOONG,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

1. Are Petitioners, University officials sued in their individual capacity pursuant to 42 U.S.C. § 1983, entitled to qualified immunity where the Respondent has established a factual threshold that her dismissal from the University was a "substantial departure from the accepted academic norm," i.e., a dismissal based on an impermissible non-academic basis, under a clearly established constitutional right substantiating her claim that Petitioners violated her substantive due process right to continued enrollment free from arbitrary dismissal?

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Respondents Rosemary Soong and James Soong respectfully request that this Court deny the petition for writ of certiorari which seeks review of the Memorandum Opinion of the Supreme Court of Hawaii filed in this case.

JURISDICTION

A strong threshold consideration that provides a fundamental reason why this Court should deny the petition for writ of certiorari is that the judgment below is not a "final judgment" within the meaning of 28 U.S.C. § 1257.

Petitioners perfected an appeal of the trial court's denial of Petitioners' motion for dismissal, or in the alternative, for summary judgment. Pursuant to Hawaii law, this order was a non-final, non-appealable judgment. *M.F. Williams, Inc. v. City and County*, 3 Haw. App. 319, 324, 650 P.2d 599, 603 (1982); *TBS Pacific, Inc. v. Tamura*, 5 Haw. App. 222, 225-226, 686 P.2d 37, 42 (1984).

The interlocutory appeal from the non-final judgment was taken pursuant to Hawaii Revised Statutes § 641-1(b) (1985). The Supreme Court of Hawaii affirmed the trial court's order denying Petitioners' motion for dismissal/summary judgment, remanding the case back to the trial court for a specific threshold consideration of whether Respondent had "exhausted all her administrative remedies before resorting to judicial action." (Pet. 4a)

It can hardly be disputed that the judgment sought to be reviewed here is a non-final judgment.

The test of "finality" is "whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942).

To be reviewable, a state court judgment "must be subject to no further review or correction in any other

state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551 (1945).

A judgment of a state court remanding the case for further proceedings, non-ministerial in nature, is not a final judgment and normally is unreviewable by the Court. *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 632-33 (1981).

The policy considerations for the rule of finality aptly serves this case. As stated in *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159 (1973):

> (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

In this case, even a disposition in favor of Petitioners by this Court on certiorari will not terminate the litigation and further appeals are possible. A determination by this Court would also be premature and advisory since the Supreme Court of Hawaii has determined that a threshold question must first be resolved to determine whether Respondents are even allowed to bring this entire action, unless they can establish exhaustion of administrative remedies. Furthermore, reviewing a case which may not even present a 'case' or 'controversy' of

federal constitutional issues hardly serves the policy of minimum federal intrusion in state affairs.

The case at bar is distinguishable from *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985), which construed the denial of a qualified immunity claim a reviewable collateral order.

In order for an interlocutory or collateral order to be reviewable by this Court, it must "conclusively determine the disputed question." *Coopers & Lybrand v. Livesay*, 437, U.S. 463, 468 (1978); *Mitchell v. Forsyth*, 472 U.S. at 527.

As stated in *Mitchell*, 472 U.S. at 527:

> Even so, the court's denial of summary judgment finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations, and because "[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred[.]"

However, in this case, the Supreme Court of Hawaii has remanded the entire case for determination of whether Respondents have exhausted their administrative remedies to determine whether any suit is valid against Petitioners.

What this means is that the trial court has the obligation to determine whether Petitioners will be subject to further discovery and whether they will be subject to further suit unless Respondents can first satisfy the threshold question of the exhaustion of administrative remedies. The trial court has the discretion to dismiss the entire case even before considering any of Petitioners'

contentions. In essence, the qualified immunity issue has not been conclusively determined.

Petitioners have prematurely filed their petition. The petition should be filed after the exhaustion of administrative remedy issue is resolved by the trial court. Only then can it be construed that the disputed question of qualified immunity is conclusively determined. The consideration of whether Petitioners' qualified immunity defense was properly determined below may be moot since the resolution of the exhaustion of remedies issue may bar Respondents' suit.

Allowing the trial court to first determine the exhaustion of administrative remedy issue serves this Court's rule and policy of hearing only final judgments, serves this Court's policy of limiting federal intrusion in state affairs, and promotes judicial economy by sparing this Court from considering an issue and suit which the state court may determine to have been improperly filed.

For this reason alone, the petition should be denied.

STATEMENT OF THE CASE

Central to this case is the factual issue of whether Respondent Rosemary Soong ("Rosemary") was dismissed from the practical nursing program of the Hawaii Community College/University of Hawaii at Hilo ("University") on an academic basis, as Petitioners contend, or in a arbitrary, capricious, ill-motive, or non-academic manner, as Respondents contend.

In the Fall of 1986, Rosemary was accepted into the Practical Nursing Program at the University. [No. 88-235 (Hawaii 1990) Record on Appeal ("RA") Volume IV at 23]. Prior to the start of classes, Rosemary, along with her fellow nursing classmates, was required to read, understand, and actually sign a document acknowledging the review of several of the University's policies. [RA I at 291]. Among those policies was the Student Academic Complaint Policy ("Policy") which stated that the rights contained therein "are regarded as fundamental aspects of the academic relationship between students and faculty members." The Policy, in a section entitled "student academic rights," also stated, *inter alia*:

> *Protection against Improper Academic Evaluation.* Students shall have protection against prejudiced or capricious academic evaluation. Student performance shall be evaluated solely on an academic basis and not on opinions or conduct in matters unrelated to academic standards. * * *

[RA I at 368].

The Policy also contained a section entitled "student academic expectations" which "relate to the responsibilities of the faculty member and the University[,]" and which stated that students have rights, *inter alia*:

> 2. To complete any course in which they are enrolled, provided their conduct is in accord with the Student Conduct Code.
>
> * * *
>
> 7. To receive fair and objective evaluations of their coursework at appropriate times during the semester, including at least one evaluation prior to the last date of course withdrawal.
>
> * * *

> 8. To receive equitable and unbiased treatment within the classroom environment conducive to learning.
>
> * * *
>
> 12. To be free from interference by faculty members or administrators to pursue an academic complaint or grievance, and to be protected against any punitive action because a complaint or grievance was filed.

[RA I at 369].

Rosemary was enrolled in the full semester course of Nursing 20. [RA IV at 23]. Nursing 20 required the passing of written examinations, clinical work, and the successful completion of "nursing care plans." [RA IV at 23]. Her instructors for Nursing 20 were Petitioners Sharon Hannah and Joyce Inaba [RA IV at 23]. Neither Hannah nor Inaba mentioned any significant deficiencies in Rosemary's work and Rosemary completed the course with a grade of "B." [RA IV at 23].

Rosemary progressed to the spring 1987 semester and was enrolled in the full semester course of Nursing 22, again taught by instructors Hannah and Inaba. [RA IV at 23].

The first half of Nursing 22 was instructed by Hannah for the clinical portion of the course. [RA IV at 23]. Hannah's instruction for the first half of the clinical rotation lasted from January 1987 through the middle of March 1987. [RA IV at 41]. Rosemary's nursing care plans for the clinical rotation, graded by Hannah, averaged above passing. [RA IV at 23]. Her written examinations also averaged well above the passing grade. [RA IV at 23]. At no time did Hannah mention that Rosemary's

performance was questionable, either in examinations or clinical work, or that she was in trouble of failing the course. [RA IV at 23].

Indeed, Hannah admitted the following in her sworn deposition testimony: "I will say that while Rosemary was a student of mine, she satisfactorily completed her rotation with me." [RA IV at 42]. Consistent with that evaluation, Hannah also admitted that Rosemary's nursing care plans submitted during her clinical rotation were satisfactory. [RA IV at 45].

Contrary to Hannah's assessment, the director of the nursing program, Genevieve L. Kinney, alleged that she sent to Rosemary in the first half of the course, a memorandum dated February 10, 1987, produced to Respondents during litigation, contending Rosemary was having academic difficulties in Nursing 22. [RA I at 223; 214]. In the 1987 spring semester year, however, Rosemary did not receive this memorandum that was purportedly sent to her. [RA IV at 23].

The second half of the clinical rotation was taught by Inaba. [RA IV at 24]. In the very first nursing care plan assignment returned by Inaba to Rosemary, Inaba refused to grade Rosemary's work. [RA IV at 24]. Sensing something was wrong, Rosemary met with Inaba and asked for a grade with helpful comments so she could improve. [RA IV at 24]. Instead, Inaba could not identify Rosemary's problems except for what she termed "spelling errors." [RA IV at 24].

Rosemary then sought the help of tutors in the class, but even the tutors were puzzled by the critical grading that Rosemary received by Inaba. [RA IV at 24].

On or about April 20, 1987, Rosemary again received her nursing care plan ungraded by Inaba. [RA IV at 24]. Rosemary went to the Director of Nursing, Kinney, to obtain her assistance in having Inaba grade her work so she could have a basis for improvement. [RA IV at 24].

Rosemary then met with Inaba who informed Rosemary in a threatening manner that if she did not withdraw from the Program, Inaba would give her fourteen "Fs." [RA IV at 24a]. Inaba's reason for insisting that Rosemary withdraw was that she could not write. [RA IV at 24a].

Later, Inaba handed Rosemary a document entitled "Request For Student Withdrawal" saying that it was "hot off the presses." [RA IV at 24a]. Inaba also told Rosemary at this time that it was too bad since instructor Hannah thought she was doing well. [RA IV at 24a]. Indeed, as for objective, written examinations, Rosemary had satisfactory grades. [RA IV at 24; RA I at 226].

Rosemary's termination occurred several weeks before final examinations. [RA IV at 24a]. Prior to her being asked to withdraw, Rosemary was not warned of her alleged "poor" clinical performance. [RA IV at 24a].

Rosemary then met with University exiting counselor, Larry Test, seeking his approval for her withdrawal. [RA I at 8]. Test indicated to Rosemary regarding her inquiry of filing an academic grievance that if he were her, he would not file the grievance if she had intentions of returning to the Program. [RA I at 9, Paragraph 41].

Rosemary then filed an academic grievance against Inaba and the Program with Janice Kido, the General

Education Chairperson, and Patrick Naughton, the Acting Provost. [RA IV at 25]. Rosemary's written grievance to Kido and Naughton dated May 15, 1987 contained a detailed account of the situation leading to her forced withdrawal in 1987. [RA I at 345-353].

Both Kido and Naughton dismissed Rosemary's grievance. [RA IV at 24a]. However, previous to his denial of Rosemary's grievance, Naughton sent a confidential internal memorandum, dated April 27, 1987, to Hannah and Inaba, through Kinney, which stated in part:

> I want you to understand that I do not question your right to fail students or to ask them to withdraw from your classes. My concern has to do with the timing of this action. I believe it is very unfair to Rosemary as a student and a person to wait so late in the semester to initiate this action.
>
> I hope that in the future, weeding out will occur much earlier in the student's career.

[RA IV at 27].

Rosemary's grievance continued to the formal academic grievance committee process. [RA IV at 24a; 29]. However, the committee was never convened and the University allowed Rosemary back into the Program, waiving her tuition. [RA IV at 29]. Phyllis Ahmadia, Chairperson of the Academic Grievance Committee, wrote a letter to the chancellor of the University, Edward Kormondy, dated January 6, 1988, that stated in part:

> She [Rosemary] has further agreed in writing to suspend her grievance although she may reassert it at her option. All the parties do not believe this is likely and we expect that Ms.

Soong will successfully complete the practical nursing course.

[RA IV at 29].

In the first half of the 1988 Spring semester in the Nursing 22 course, Rosemary had Petitioner Sonja Notz as her instructor for the clinical portion of the course. [RA IV at 25]. At the very beginning of the semester, Notz sent to Rosemary a memorandum alleging thirty (30) some odd points of deficiencies in Rosemary's performance. [RA IV at 25; RA I at 297-299]. Rosemary was shocked at these allegations, some of which penalized her for asking for help. [RA IV at 25; RA I 297-299].

Sensing that the Program had received her back without any intention of helping her succeed, with their only purpose to terminate her from the Program "the right way", Rosemary became very upset. [RA IV at 25]. Apparently, Rosemary's emotional distress was so severe that Notz took Rosemary to a public mental health clinic. [RA IV at 25].

In Notz's last memorandum to Rosemary while in the Program, dated 2-12-88, Notz also included a "Special Note" at the end of the memorandum indicating Rosemary had a "very big mouth." [RA IV at 25; RA I at 302-304]. Upon reading this note, Rosemary felt shock and experienced distress because it had become clear to her that neither Notz nor the individuals running the Program at the University had any intention of helping her or treating her fairly. [RA IV at 25].

The University's Admissions and Progression Committee, composed of Hannah, Kinney, Larry Test, Winifred Tatsuda, Judith Miller, Eleanor Sterling, and Jeanette Justice, recommended that Rosemary be dropped from the Program. [RA I at 13].

After the suit was filed against Petitioners and the University, Respondents supported their opposition to Defendants' motion for dismissal/summary judgment with a copy of a report by Rosemary Burnett, their expert witness. [Pet. 52a-57a] Burnett was a tenured nursing instructor for many years at the University and its Director of Nursing for over two years. [Pet. 48a-49a]. It was Burnett's opinion that Rosemary should not have been terminated in 1987 nor 1988, that she was unfairly treated, that the nursing program did not follow its own criteria and guidelines, and from all of this, that there was reason to believe that Rosemary was terminated for *non-academic reasons*. [Pet. 54a-55a].

Petitioners' motion was denied by the trial court. On interlocutory appeal, the Supreme Court of Hawaii affirmed the decision. Petitioners' motion for reconsideration, which again addressed the qualified immunity issue, was denied.

REASONS WHY THE PETITION SHOULD BE DENIED

This case does not merit consideration by this Court. The decision of the Supreme Court of Hawaii turned on a factual issue that underlies this entire case, which Petitioners refuse to recognize: that Respondent Rosemary

Soong was terminated for an improper non-academic reason.

The decision of the Supreme Court of Hawaii is an unpublished memorandum decision. It carries no precedential value in the State of Hawaii[1], nor in any other state court of last resort, nor of the United States court of appeals. The decision turned on a factual issue. It did not create new law. It did not decide a federal question in a way that conflicts with the decision of a state court of last resort or of a United States court of appeals.

Moreover, the Supreme Court of Hawaii did not decide an important question of federal law but instead followed closely this Court's decision in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985) and determined that factually, Respondents stated a cause of action under 42 U.S.C. §1983, and that Respondents were not entitled, as a matter of law, to qualified immunity.

A. THE RESOLUTION OF THIS CASE ADDS NOTHING TO THE ALREADY ESTABLISHED LAW OF QUALIFIED IMMUNITY.

1. Petitioners merely seek to have this Court re-evaluate the facts presented in this case.

The Supreme Court of Hawaii held that upon a "careful review of the record," the facts supported

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[1] Rule 35(c) of the Hawaii Rules of Appellate Procedure states: "Citation. A memorandum opinion shall not be cited in any other action or proceeding except when the opinion establishes the law of the pending case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent.

Respondents' allegation that Rosemary's termination was a substantial departure from the academic norm. (Pet. 4a). In essence, Rosemary was terminated from continued enrollment in her University program for an impermissible, non-academic reason. Her termination was not the result of an exercise of professional judgment.

It is on this *factual* basis that the Supreme Court of Hawaii found that Rosemary came within the parameters of *Regents v. Ewing, supra,* for judicial review of her academic dismissal under the framework of a substantive due process protection of her property interest in continued enrollment, free from arbitrary, non-academic dismissal.

"Property interests" protected by due process are "defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972). Agreements implied from the promissor's words and conduct in light of the surrounding circumstances, i.e., express or implied contracts, could be independent sources of property interests. *Perry v. Sindermann,* 408 U.S. 593, 601, 602 (1972). A protected property interest may attach to any such understanding, that in substance, give rise to an "individual entitlement which cannot be removed except for cause.' " *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 430 (1982).

The University's Student Academic Complaint Policy provides a firm basis for Rosemary's property right. It states explicitly that students such as Rosemary have a right to protection from "improper," "prejudiced," "capricious" evaluation, and a right to be evaluated solely on

an academic basis. The policy was formulated and issued by the University and Rosemary was required to read and understand it. A document evidences Rosemary's signature and acknowledgement that she read and understood the Policy. Whether the Policy be deemed an understanding, an express or implied contract, or a state entitlement, the right to continued enrollment free from arbitrary, non-academic dismissal was in fact a property right in this case.

The Supreme Court of Hawaii had long ago held that a deprivation of a "legitimate claim of entitlement" to benefits under state law or regulation, if claimed under a "clearly implied promise" are property rights entitled to due process protection. *Kekoa v. Supreme Court*, 55 Hawaii 104, 108, 516 P.2d 1239 (1973), *cert. denied*, 417 U.S. 930 (1974).

This case is unlike *Regents v. Ewing, supra*, in that the property right here is more clearly established under Hawaii law.

Thus, under the particular and compelling facts of this case, the Supreme Court of Hawaii determined that Respondents sustained a cause of action pursuant to *Regents v. Ewing, supra*. Such a determination was also in accord with its own decision in *Kekoa v. Supreme Court, supra*.

The Supreme Court of Hawaii did not change or create new law, but applied the facts presented to existing law. Furthermore, it did so in a way that did not establish future precedent.

2. The facts established below supported the determination that Petitioners were not entitled to qualified immunity and the Supreme Court of Hawaii did not misapply the law.

At the time Petitioner's motion for dismissal/summary judgment was decided and rejected by the trial court, and the decision affirmed on appeal by the Supreme Court of Hawaii, this Court had firmly established the law of qualified immunity as it pertains to suits against government officials in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), *Mitchell v. Forsyth,* 472 U.S. 511 (1985), and *Anderson v. Creighton,* 483 U.S. 635 (1987).

Petitioners cited to and explained both *Harlow* and *Anderson* at the trial court, and all three cases to the Supreme Court of Hawaii.

The Supreme Court of Hawaii in no way misapplied or changed the qualified immunity doctrine. To the contrary, the Hawaii Intermediate Court of appeals mirrored this Court's qualified immunity doctrine in a 42 U.S.C. §1983 case in *Makanui v. Department of Education,* 6 Haw. App. 397, 407, 721 P.2d 165, 172 (1986). Petitioners' contention that the Supreme Court of Hawaii failed to understand the qualified immunity doctrine is unfounded.

Petitioners fail in their qualified immunity defense if their conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The defense normally fails if the law was clearly established at the time of the alleged conduct "since a reasonably competent public official should know the law governing his conduct." *Harlow,* 457 U.S. at 819.

While it has been well settled that discovery should not proceed in a qualified immunity claim until the threshold question of whether the law was "clearly established" at the time of the actionable conduct, *Mitchell v. Forsyth*, 472 U.S. at 426, Petitioners here waived this right to a degree as they filed their motion to dismiss/summary judgment on March 22, 1990, nearly two years after the complaint was filed.

By the time Petitioners raised the qualified immunity issue before the lower court, Respondents had already gathered enough evidence to show that Petitioners violated a clearly established constitutional right of Rosemary. As held in *Mitchell*, 472 U.S. at 526:

> Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

The Supreme Court of Hawaii, after carefully reviewing the record, determined that there was a genuine issue as to whether Petitioners terminated Rosemary for a non-academic reason that did not reflect professional judgment. This factual determination is Petitioners' main complaint with the lower courts.

In *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) this Court explained the threshold element of "clearly established law" in the qualified immunity doctrine:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

> *This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful,* see *Mitchell, supra,* 472 U.S., at 535, n. 12, 105 S.Ct., at 2820, n. 12; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

(emphasis added).

At the time of Petitioners' alleged wrongful acts in 1987 and 1988, it was explicitly clear that evaluation of a student on a non-academic, arbitrary and/or capricious manner was unlawful. The University's own edicts in the form of the Student Academic Complaint Policy expressly prohibited this type of conduct by Petitioners.

Together with this Court's decision in *Regents v. Ewing, supra,* and the Supreme Court of Hawaii's decision in *Kekoa v. Supreme Court,* 55 Hawaii 104, 108, 516 P.2d 1239 (1973), which held in 1973 that a deprivation of benefits from government if claimed under a "clearly implied promise" are property rights entitled to due process protection, it was proper for the Supreme Court of Hawaii to determine that under the particular circumstances of this case, the constitutional right was clearly established and that Petitioners should have known their acts violated Respondent Rosemary Soong's constitutional rights.

In *Regents v. Ewing, supra,* this Court determined that the facts presented did not establish any constitutional violation and therefore it was unnecessary to rule on the constitutional issue. However, this Court made explicitly clear that a court may override an academic decision

where it is a "substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Regents v. Ewing*, 474 U.S. at 225.

It can hardly be questioned that the framework for the constitutional right was firmly established by this Court in the hypothetical factual situation that was not before this Court in *Ewing*. Terminating a student for a non-academic reason was clearly known by Petitioners to be prohibited. *Ewing* made this clear. Petitioners have also cited to this Court numerous cases where the courts have acknowledged that a constitutional violation is established, under the proper factual circumstances, where it is shown that the student was terminated for non-academic reasons.

Petitioners reason that because *Ewing* assumed without deciding whether a substantive due process right to continued enrollment existed, that this alone along with numerous other cases following the same ruling, confirms that the right was not clearly established.

Petitioners' reasoning is flawed. To accept Petitioners' reasoning is to always grant immunity to school officials who are accused and are proved to have terminated a student in bad faith or for a non-academic reason. The school official could well admit that he/she in fact terminated a student for an impermissible non-academic reason and still be protected by qualified immunity.

This Court did not intend to bring about such a preposterous result in the use of qualified immunity. As this Court has aptly stated, "[b]y defining the limits of

qualified immunity essentially in objective terms, we provide no license to lawless conduct." *Harlow v. Fitzgerald,* 457 U.S. at 819.

We are reminded by this Court's statement in *Anderson v. Creighton,* 483 U.S. at 640, that Petitioners do not establish immunity merely because the very action in question was not previously held unlawful. Instead, like this case, pre-existing law made it "apparent" that to terminate a student for an impermissible non-academic reason was unlawful.

There are peculiar and compelling facts in this case. In light of pre-existing law and other circumstances, the Supreme Court of Hawaii made a legal determination, as did the trial court below it, that the constitutional right of Rosemary was "clearly established."

Petitioners merely disagree with the lower court's assessment of the facts presented and not the law. Instead, Petitioners want this Court to re-evaluate the facts as presented. Under such circumstances, review by this Court is unwarranted.

3. This Court's recent rulings in *Siegert v. Gilley* and *Burns v. Reed* do not change the law of qualified immunity and remand for consideration of these cases would be fruitless.

Siegert v. Gilley, 111 S.Ct. 1789 (U.S. May 23, 1991) reaffirmed the qualified immunity doctrine established in *Harlow.* What was notable in *Siegert* was that the alleged constitutionally protected interest asserted by the petitioner was, prior to the alleged conduct, held by this court to be conclusively not a protected constitutional

interest. *Siegert v. Gilley*, 111 S.Ct. at 1794. Therefore, as a matter of law, there did not exist a "clearly established" right at the time of the alleged wrongful conduct, and therefore, qualified immunity was established pursuant to *Harlow, supra.*

In this case, *Regents v. Ewing, supra,* decided in 1985, had the opportunity to explicitly reject the constitutional claim asserted by Respondents, but refused to do so. If anything, *Siegert* reinforces and supports the decision of the Supreme Court of Hawaii.

Burns v. Reed, 111 S.Ct. 1934 (U.S. May 30, 1991), also adds nothing to the qualified immunity doctrine. In *Burns,* this Court addressed the applicability of the *absolute* immunity doctrine to state prosecutors in their various duties. Respondents are at a loss as to why a consideration of *Burns* could justify a remand. This would not only be improper, but would be a certain waste of judicial resources.

It should be plain that the decisions in *Siegert* and *Burns* are inapplicable to this case. That Petitioners are calling for a review of this case in light of *Siegert* and *Burns* only mirrors the weakness of Petitioners' arguments which reflect that this case does not merit this Court's consideration.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: Hilo, Hawaii, August 28, 1991.

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